IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

RFA.No. 353 of 2005()

AGAINST THE ORDER DATED 09/06/2005 IN IA 5103/04 IN OS.407/2004 of PRINCIPAL SUB COURT,KOLLAM
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APPELLANT/RESPONDENT/PLAINTIFF

B.GOPINATHAN,
PANKAJA SADANAM, HOUSE NO.7,
NETHAJI NAGAR, ASRAMAM, KOLLAM EAST VILLAGE.

BY ADV. SMT.V.P.SEEMANDINI (SR.)
SMT.S.KARTHIKA
SMT.LEKSHMY RAMANATHAN

RESPONDENTS/CLAIMANTS AND DEFENDANTS:
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1. KUNJUKUNJU,
KALLUVILA VEEDU, ELAMADU VILLAGE,
CHERUVAKKAL, KOTTARAKKARA, PROPRIETOR,
M/S.KALLUVILA CASHEWS, KOLLAM.

2. S.SHAHEER,
SHAMEER MANZIL, KILIKOLLOOR,
KOLLAM.

3. SAINAL ABDEEN SHEREEF,
SHIHAD MANZIL, KALAKKODU,
POOTHAKULAM, PARAVOOR.

R1 BY ADV. SRI P.N.RAVINDRAN
R2 & R3 BY ADV. SRI.K.JAYAKUMAR
SRI.C.C.ABRAHAM
SRI.DILEEP P.PILLAI
SRI.P.B.KRISHNAN
SMT.GEETHA P.MENON

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 24/10/2007 ALONG WITH FAO NO. 222 OF 2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO.2079/2005 IN RFA.NO.353/2005

Dismissed

Sd/- P.R.RAMAN, JUDGE.

24/10/2007

Sd/- V.K.MOHANAN, JUDGE.

P.R.RAMAN & V.K.MOHANAN, JJ.

F.A.O.NO.222 OF 2005 &
R.F.A.NO.353 OF 2005

Dated this the 24th day of October, 2007

JUDGMENT

Raman, J.

An order of attachment was passed in I.A.NO.3906/2004, which was vacated subsequently at the instance of the lst respondent herein which give rise to the appeal, F.A.O. No.222/2005. I.A.No.5103/2004 was filed by the lst respondent herein inter alia contending that the property attached belonged to him absolutely. That claim was eventually allowed. Hence, R.F.A.No.353/2005 is filed. Though technically two appeals are filed, the subject matter is one and the same. Hence, these appeals are disposed of by this common judgment.

2. The appellant is the plaintiff in O.S.No.407/2004. According to the appellant, by an agreement dated 24/11/2003, the 2nd respondent herein executed a sale agreement with the appellant in the capacity as a power of attorney holder of the 3rd respondent. The agreement was for sale of an extent of 108.326 cents of land in Alleppey District for an agreed price of Rs.33 lakhs. The total amount of Rs.24,60,500/-

was paid in two instalments towards the sale consideration. Agreement was dated 24/11/2003 and the period for performance of the agreement was till 18/6/2004. However, the sale did not take place as agreed to between the parties. Hence, the 3rd respondent agreed to pay back an amount of Rs.21,20,500/-. But he did not pay the same and subsequently by interference of the mediators, an amount of Rs.14,50,000/- was repaid to the appellant by way of demand draft dated 19/6/2004. For the balance amount of Rs.6,70,500/- an agreement was executed by the 3rd respondent agreeing to pay back the said balance amount within four months from 19/6/2004. So however, the amount as agreed upon was also not paid. Hence, the present suit was instituted by the appellant for realisation of the said amount with interest thereon. The suit is pending trial. Along with the suit I.A.No.3906/2004 was filed for an order of attachment before judgment of an extent of 76 cents of land belonging to the 3rd respondent more particularly described in the attachment schedule. Initially, the court below ordered attachment ex parte on 20/11/2004 and thereafter the lst respondent entered appearance and filed I.A.No.5103/2004 for lifting the attachment claiming himself to be the true owner of the property, who purchased the same by virtue of the sale deed executed on 2/9/2004. According to him, he is a bona fide purchaser without notice. On the other hand, it was contended by the appellant

that the sale deed executed in favour of the lst respondent is a sham document and also alleged that there is collusion between the parties to the document. In this connection emphasis was laid on the fact that at the time when the property said to have been purchased by the lst respondent, there was an outstanding loan payable to the Kerala Financial Corporation and in support thereof Ext.P3 document was produced. Ext.B4 is a certificate issued by the Kerala Fiancial Corporation certifying the outstanding liability of an amount of Rs.24 lakhs. It is the contention of the appellant that the property was mortgaged in favour of the Kerala Financial Corporation for securing the loan amount by depositing the title deed. That fact obviously is not made mention of in the sale deed. The total consideration fixed in the sale deed is Rs.10 lakhs. Thus, according to the appellant, the prior encumbrance in respect of the property was not even shown in the document. According to the appellant, this is one factor to show collusion between the lst respondent and the 3rd respondent. It was also contended that since the present properties are also included in the earlier power of attorney deed executed in favour of the 2nd respondent, in the absence of any cancellation of the said deed, it cannot be validly transferred as per the deed now executed. Though it was also contended that the earlier power of attorney is an agreement

coupled with interest, we have gone through the power of attorney executed in favour of the 2nd respondent by the 3rd respondent and prima facie we do not find that there is any transfer of interest in the property. However, the court below by the impugned order held that the collusion as alleged by the appellant is not proved. It is also held that the sale deed executed in favour of the lst respondent was on 2/9/2004, a photocopy of which was marked as Ext.A1. He has also paid tax in respect of the property evidenced by Ext.A2. Ext.A3 is the photocopy of the licence issued. The encumbrance certificate issued on 1/9/2004 for the period from 1/1/1999 to 26/8/2004 did not show any encumbrance of the property in favour of the Kerala Financial Corporation. The court below considered these pieces of evidence; but did not enter a definite finding as to whether Ext.A1 was legally executed and whether the mutation effected legally. According to the court below, this can be decided only after trial. But the evidence now produced namely, Ext.A1 sale deed, would show that the property was purchased long before the order of attachment passed in the case and mutation was also effected before the attachment order. Collusion as alleged is not supported by the evidence as at present. These are the grounds which weighed the court to hold that the order of attachment passed in I.A.No.3906/2004 is liable to be vacated. The said order is impugned in these appeals.

3. We have heard both sides.

4. The court below has not entered a final finding as to whether the sale deed assigning the property sought to be attached is legally valid and legally executed. True Ext.A1, photocopy of the sale agreement produced in this case, would show that Ext.A1 was executed long prior to the order of attachment. But the appellant has specifically raised a contention that the said document is sham and the power of attorney holder did not have the power to execute the document in view of the earlier power of attorney executed and in the absence of any revocation of the said power, it is contended that the court below ought to have held that no right as such conferred to the lst respondent based on the sale deed. It is true that the contention as such raised in the objection filed by the appellant is not seen considered by the court below. The power of attorney, based on which Ext.A1 document was executed, is also not produced in the case. When the property already attached and when the lst respondent filed an application to lift the attachment claiming that the property belongs to him and produced evidence thereof, the question to be considered is as to whether the appellant has become the absolute owner of the property and in that regard the contention of the appellant ought to be considered before upholding the claim of the lst respondent. The court below has not approached the issue in the proper perspective.

5. In the circumstances, we set aside the order passed by the court below and remit the matter for fresh consideration in accordance with law. Both sides shall be given opportunity to adduce additional evidence in support of their contentions. The court below shall dispose of the matter expeditiously, as any delay in disposing the matter shall adversely affect the interest of the lst respondent, if it is found that he is the bona fide purchaser. Hence, the court below shall pass final orders as expeditiously as possible, at any rate within a period of four months.

Parties shall appear before the court below on 03/12/2007.

P.R.RAMAN,
Judge.

V.K.MOHANAN,
Judge.

kcv.